

BIMIL SDN BHD

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v.

JENISWIRE TIMBER SDN BHD

HIGH COURT SABAH AND SARAWAK, SANDAKAN

b

RICHARD MALANJUM J

[CIVIL SUIT NO: S22-01-2000]

28 NOVEMBER 2001

CIVIL PROCEDURE: *Appeal - Final or interlocutory order - Ruling by deputy registrar - Whether a “decision” under s. 3 of Courts of Judicature Act 1964 - Whether appealable - Amendment - Defence - Rules of the High Court 1980, O. 20 r. 5 - Whether there were fresh facts to allow amendment*

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The plaintiff brought a claim against the defendant for breach of contract pertaining to a lease agreement. Upon being served with the plaintiff’s statement of claim, the defendant entered defence to which the plaintiff applied to have it struck off. The defendant then sought to amend its statement of defence under O. 20 r. 5 of the Rules of the High Court 1980 (‘the RHC’) but this was denied by the deputy registrar. The defendant appealed to this court against the said ruling.

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Relying upon s. 3 of the Courts of Judicature Act 1964 (‘the Act’), the plaintiff submitted that the said appeal was incompetent in that the ruling was interlocutory and not final.

Held:

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[1] Under O. 20 r. 5 of the RHC, the court has the discretion to amend any pleadings on application and the interlocutory ruling of the deputy registrar was a proper exercise of such a discretion. Pursuant to the amended version of the word “decision” in s. 3 of the Act, only final orders are appealable. As the said ruling was not a final order, the defendant’s appeal was dismissed *in limine*. (pp 282 d-h & 283 a)

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[2] The amendments proposed by the defendant were not the products of new facts discovered. Thus, the defendant’s application to amend the statement of defence ought to be disallowed. (p 283 d-e)

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[Appeal dismissed with costs.]

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- a Case(s) referred to:**
Teoh Poh Keong Sdn Bhd v. Shinhan Engineering & Construction Co Ltd [2001] 2 CLJ 440 (foll)

Legislation referred to:

Courts of Judicature Act 1964, s. 3

- b** Rules of the High Court 1980, O. 20 r. 5(1)

For the plaintiff - Alex Khoo; M/s Peter Lo & Co

For the defendant - Edwin Tsen; M/s Tan Pang Tsen & Co

Reported by M Maheswaran

c JUDGMENT

Richard Malanjum J:

By way notice of appeal to judge in chambers dated 2 June 2000 the defendant/appellant is appealing against the decision of the learned deputy registrar dismissing its application to amend the defence.

- d** There were several adjournments to the hearings in order to enable learned counsel to do further research on the points raised, in particular on the issue of whether this appeal is competent in view of s. 3 of the Courts of Judicature Act 1964 ('the Act') as amended.

- e** The claim of the plaintiff is for breach of contract in relation to a lease agreement dated 8 August 1998 entered between the plaintiff and the defendant. It is the case of the plaintiff that the defendant failed to pay the agreed rentals and further damaged the chattels in the demised premises leased to the defendant. It is also the claim of the plaintiff that the defendant repudiated the agreement and the plaintiff had accepted it with the right to claim for damages reserved.

- f** The defendant filed its defence admitting the first three paragraphs of the statement of claim with the rest traversed.

- g** The plaintiff subsequently filed an application to strike out the defence which was supported by an affidavit.

- h** After being served with the application the defendant made an application to amend its defence by way of summons in chambers dated 5 May 2000 (encl. 27).

The application was objected to by the plaintiff and the learned deputy registrar dismissed it and hence this appeal.

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Before going into the merits of the appeal learned counsel for the parties agreed that the issue of whether the appeal is competent should be addressed. Thus I will proceed to deal with that issue first and then deal with the merit of the appeal if necessary.

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It is the contention of learned counsel for the plaintiff that this appeal is incompetent in that the ruling made by the learned deputy registrar is an interlocutory order and thus not appealable in view of the definition of the word 'decision' in the amended s. 3 of the Act which provides that only a final order is appealable.

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On the other hand, learned counsel for the defendant submitted that in making his ruling the learned deputy registrar was only exercising his discretion and hence the hearing before this court is not an appeal as such but a continuation of that hearing. As such s. 3 has no application.

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I had an occasion to consider a similar issue in the case of *Teoh Poh Keong Sdn Bhd v. Shinhan Engineering & Construction Co Ltd* [2001] 2 CLJ 440 and this was what I said at pp. 447-449:

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Another approach that may be viable is to say that an appeal from the registrar to a judge in chambers is in fact not an appeal *per se* but a rehearing. Hence, the issue of whether a ruling of the registrar is interlocutory or final does not arise. The case of *Seloga Jaya Sdn Bhd v. Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716 may come to mind where his Lordship Edgar Joseph Jr. SCJ at pp. 723-724:

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In *Blundell v. Rimmer*, Payne J when considering an appeal from an order of the district registrar giving leave to sign interlocutory judgment in an action for negligence, had occasion to refer to Lord Atkin's speech in *Evans v. Bartlam* in these terms:

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I understand that the arguments before me ranged over a wider ground than those advanced by the parties' solicitors to the district registrar, and it was contended by counsel for the plaintiff that I was fettered by the proceedings before the district registrar and confined to the arguments which were presented to him, that no point could be raised before me which was not raised below. It is, I think, clear on authority that the appeal from the district registrar is a rehearing of the application and I am entitled to treat the matter as though it comes before me for the first time, moreover, that I am not fettered by the previous exercise of the district registrar's discretion, although I should, of course, give to it the weight which it deserves. Authority can be found for this proposition in the speech of Lord Atkin in *Evans v. Bartlam* and in the notes in 1 The Supreme Court Practice 1970 at p 759 para 58/1/2, p 762 para 58/4/1, under RSC O 58 rr 1 and 4.

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- a** In the Singapore High Court case of *Herbs and Spices Trading Post Pte Ltd v. Deo Silver (Pte) Ltd*, a similar point was made by Chan Sek Keong J in these terms (at p 313 col 2C-E):
- The situation in O. 55 is analogous to ‘appeals’ from the decisions of the registrar of the High Court to the judge-in-chambers. In such appeals,
- b** the judge in chambers is not exercising ‘appellate’ jurisdiction in the same sense when it hears appeals from the district court. This view is consistent with the rule that an appeal from the registrar of the High Court to the judge-in-chambers is by way of an actual rehearing of the application and the judge treats the matter afresh as though it came before him the first time
- c** With Lord Atkin’s observations in mind, the first point we should like to make is that since the registrar gave no judgment but only a bare decision, or in other words, a simple *ipse dixit*, it deserved no weight at all. Yet, it is obvious that the judge gave some weight to the decision of the registrar.
- d** The second point we should like to make is that the judge did mention in passing – in our view quite correctly – that though the matter before him was in form an appeal, it did “take the shape and style of rehearing ...”. However, in his approach to the questions for decision, he treated the appeal, in the fullest sense, as an appeal from a discretionary order made by the registrar.
- e** In other words, it looks very much as though the judge’s approach was that he should not interfere with the registrar’s exercise of discretion unless it was shown that the discretion had been exercised on a wrong principle or not at all, or that there had been a miscarriage of justice.
- f** In other words, as an appellate judge, he was not to exercise an independent discretion of his own, but had to defer to the registrar’s exercise of his discretion and could not interfere with it merely on the ground that he would have exercised it differently. (See 37 *Halsbury’s Laws of England* (4th Ed) para 656 at p 493.) In adopting this approach, the judge was wrong, the appeal before him being from the registrar
- g** by way of an actual rehearing.
- I have given anxious consideration as to the merits of such an approach and it is my humble view that in *Seloga Jaya Sdn Bhd*’s case his Lordship was addressing an issue where an exercise of discretion was involved. This was what he said earlier at p. 723:
- h** Now, in *Evans v. Bartlam* [1973] AC 473, HL, Lord Atkin said this (at p. 478):
- The power to set aside a judgment obtained on default of appearance is given to the court or a judge under O. XII r. 10; and a similar
- i** power extending to judgments by default under any rule is given by

O XXVII r. 15. It is a power entrusted to the discretion of the court or judge, and by O. LIV r. 12, the Master is given jurisdiction to exercise the discretion.

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As to the limits of the discretion, if any, it may be necessary to say a word or two later. I stay only to mention a contention of the respondent that the Master having exercised his discretion, the judge-in-chambers should not reverse him unless it was made evident that the Master has exercised his discretion on wrong principles. I wish to state my conviction that where there is a discretionary jurisdiction given to the court or a judge, the judge-in-chambers is in no way fettered by the previous exercise of the Master's discretion. His own discretion is intended by the rules to determine the parties' rights: and he is entitled to exercise it as though the matter came before him for the first time. He will, of course, give the weight it deserves to the previous decision of the Master: but he is in no way bound by it. This, in my experience, has always been the practice in chambers, and I am glad to find it confirmed by the recent decision of the Court of Appeal in *Cooper v. Cooler* [1936] WN 205, with which I entirely agree.

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Two things are plain from the above passage in the judgment of Lord Atkin, namely:

- (1) in an appeal from a discretionary order of the Master (equivalent here to a senior assistant registrar) to a judge-in-chambers, the judge exercises his own discretion as though the matter comes before him for the first time, unfettered by the previous exercise of the Master's discretion, and
- (2) so far as the Master's decision is concerned, the judge will give it the weight it deserves.

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Now the application of the defendant was made under O. 20 r. 5 of Rules of the High Court 1980 ('RHC') which reads thus:

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5. Amendment or writ of pleading with leave. (O. 20 r. 5)

- (1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.
- (2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.
- (3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that

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- a** the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.
- b** (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.
- c** (5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.
- d** It is obvious that r. 5(1) provides a discretionary power to the court to amend any pleadings on application. Hence to that extent learned counsel for the defendant is correct to say that in making his ruling the learned deputy registrar was exercising his discretion. But should that therefore exclude the application of s. 3 of the Act? For a moment I am tempted to say in the affirmative in view of the effect if it is to be in the negative particularly when
- e** it involves an application for amendment of pleadings. However this was what I also said in *Teoh Poh Keong's* case (*supra*) at p. 450:
- f** As such, it is my judgment that not all rulings, decisions, judgments or orders of a registrar (which includes a deputy and senior assistant registrar) is appealable to a judge in chambers. The element of finality in the disposal of the rights of the parties must be present in such rulings, judgments, orders or decisions, particularly where there is no exercise of discretion involved. Accordingly, an interlocutory judgment, order, ruling or decision is not appealable. I am very much aware that what I have said here may appear to be hair splitting, but I cannot ignore the fact that there is the amended version
- g** of the definition of the word 'decision' in s. 3 of the CJA and the probable legislative intent for such an amendment. *Further, indeed O. 56 r. 1 of the RHC speaks of an 'appeal' to begin with. And in my view Seloga Jaya Sdn Bhd should not be read as having amended the provision, but only provided a guideline in approaching such an appeal, particularly where discretion is involved.* (emphasis added).
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- Accordingly I must say that even an application involving the exercise of discretion is caught by the amended version of the word 'decision' in s. 3 of the Act where an order made is an interlocutory order.
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And in the present case there is no dispute that the ruling of the learned deputy registrar is interlocutory in nature and thus is caught by the said section in relation to the definition of the word 'decision' therein. Hence I agree with learned counsel for the plaintiff that this appeal of the defendant is incompetent and should be dismissed *in limine*.

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In the event that I am wrong in the foregoing conclusion I have also taken the liberty to consider the merit of the appeal of the defendant.

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It is the contention of learned counsel for the plaintiff that the application was made in bad faith in that it was only filed after the application to strike out was made. Hence according to learned counsel it was prejudicial to the plaintiff. It was also submitted that the proposed amendments would have the effect of changing the issues raised earlier to an entirely different and inconsistent character.

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For the defendant it was submitted that the proposed amendments were necessary in view of the new facts discovered. It was also contended that any prejudice that might arise to the detriment of the plaintiff could be compensated in terms of costs.

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Having perused the proposed amendments I am of the view that it is not entirely true to say that they are the products of new facts discovered. The proposed new para. 2 of the defence is partly in fact a retraction from an earlier admission of para. 3 of the statement of claim. And I find no basis to say such retraction is due to new fact discovered. In my view the proposed new para. 2 is a point of law which should have been considered by the draftsman when preparing the defence. So to hide behind the cover of 'new fact discovered' is not a good reason and in fact is an indication that the application has not been made in all sincerity. Thus I have no qualms in disallowing this proposed paragraph.

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As for the proposed new para. 3 of the defence it is only a matter of the amount which I think could be addressed later on. I should also disallow this proposed new para. 3.

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In respect of the proposed new paras. 5, 6 and 7, I am also not satisfied that they have become necessary due to new facts discovered. Indeed in the affidavit in support of the application to amend the only reason relied upon which allegedly necessitated the proposed amendments was the discovery of new facts without any elaboration. However, on perusal of the proposed amendments there is nothing to indicate that such facts could not have been obtained before the filing the defence. For instance the proposed new para. 5 speaks of negligence on the part of the plaintiff. Surely this would have been known by the defendant even before the suit was commenced. Similarly for

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- a* the proposed new paras. 6 and 7 they relate to mitigation of loss and payment of a sum to the plaintiff in relation to the lease agreement. Again these should have been within the knowledge of the defendant much earlier. It might have been different if it was the allegation of the solicitors for the defendant that they were not briefed on those matters. In the present case the deponent of the affidavit in support of the application was the managing director of the defendant.

The amendment to para. 8 is related to the issue raised in the proposed new para. 3 and for the same reason therein I should also disallow it.

- c* And finally for the proposed new para. 9 the subject raised therein must have been in the knowledge of the defendant as the same could be found in the lease agreement. Hence it is not due to discovery of new facts as alleged.

For the reasons hereinabove I should therefore dismiss this appeal with costs to the plaintiff to be taxed unless agreed.

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